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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ANTOCI,

Defendant and Appellant.

2d Crim. No. B219541
(Super. Ct. No. BA348024)
(Los Angeles County)

Michael Antoci appeals a judgment after his conviction of two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),¹ with a jury finding that he personally inflicted great bodily injury on victim Edward Sanchez (§ 12022.7, subd. (a)). The trial court denied Antoci's request to be placed on probation. It sentenced him to an aggregate prison term of five years. On count one, the assault on victim Sanchez, the court imposed a two-year term plus three years for the great bodily injury enhancement. On count two, the assault on victim Jonathan Gill, the court imposed a two-year concurrent term.

We conclude, among other things, that 1) the trial court did not abuse its discretion by not placing Antoci on probation, 2) Antoci has not shown that the court was unaware of its obligation to consider a victim's position on sentencing, 3) the court did not use Antoci's drug and alcohol problem as an improper sentencing factor, 4) a finding

¹ All statutory references are to the Penal Code.

that the defense witnesses committed perjury was not used as an aggravating sentencing factor, 5) the trial judge's remarks at the sentencing hearing about Antoci's intent to kill did not constitute reversible error, and 6) the court was aware of its discretion to strike the great bodily injury enhancement. We affirm.

FACTS

In October of 2008, Jonathan Gill was the manager of the Loft Apartments in Los Angeles. He learned that Antoci was staying in apartment 21 of this complex, but that unit had been rented to tenant Greg Bernhardt. Gill subsequently learned that Bernhardt had changed the locks on apartment 21. This prevented Antoci from having access to that unit.

On October 20, a tenant informed Gill that there was a "disturbance" near apartment 21. Gill and his assistant, Edward Sanchez, went to that apartment and discovered that Antoci had "broken in." Gill told Antoci to leave the apartment. He said, "[Y]ou're not supposed to be here."

Antoci did not comply and became "[v]ery belligerent and very aggressive." He grabbed a steel gas pipe. It was five to six feet long and three-quarters of an inch wide. Antoci held it above his head "Samurai style." He then swung the pipe at Gill. It hit Gill's head and arm. The impact with the pipe resulted in Gill having a "big bump" on his head.

Antoci continued to swing the pipe. He swung it towards Sanchez's head. Sanchez tried to block the blow with his arm. The pipe hit his arm and broke it. The pain from this blow was "excruciating."

Sanchez was taken by ambulance to a hospital. He underwent surgery. The break in his arm was so severe that the doctors had to insert "steel plates" and eight screws to hold the bones in his arm together.

At the sentencing hearing, the trial court rejected Antoci's request to be placed on probation. It noted that the injuries to Sanchez "are horrific," and that he has "metal in his arm through no fault of his own." The court said, "[C]learly this is not a probation case."

DISCUSSION

Abuse of Discretion

Antoci contends the trial court erred by not placing him on probation. We disagree. "The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion." (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.)

Antoci has not met his burden. He committed assault with a deadly weapon on two people. His offenses were violent crimes which caused extensive pain to the victims. He broke Sanchez's arm. Sanchez experienced "excruciating" pain and underwent surgery. Sanchez testified that he used his arm to block the blow because Antoci aimed the metal rod at his head. Gill suffered a "big bump" on his head and pain from his palm to his elbow.

These were not Antoci's first offenses. He had a prior conviction that also involved violence, inflicting corporal injury to a spouse/cohabitant. (§ 273.5, subd. (a).) In his probation report, the probation officer noted that Antoci's actions were "deliberate" and "his prior grant of probation for battery demonstrates a developing pattern of violence." The probation officer also said that an aggravating sentencing factor was that Antoci's current offenses involved "a high degree of cruelty, viciousness, or callousness."

Section 1203, subdivision (e)(2) states that "[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to . . . [a]ny person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted." Antoci had the burden to demonstrate that his case involved an exception to the statutory rule that he was ineligible for probation. (*People v. Aubrey, supra*, 65 Cal.App.4th at p. 282.) He has not met his burden and he has not shown an abuse of discretion.

Ignoring the Victim's Recommendation on Sentencing

Antoci contends the trial court erred by refusing to consider victim Sanchez's request that Antoci not be sent to prison. He notes that victims have a right to appear at the sentencing hearing and express their views on the sentence. (§ 1191.1.)

But Sanchez did not appear in court to make a victim statement. Instead, Antoci's trial counsel presented a declaration signed by Sanchez which was prepared by defense counsel.

The trial court did not ignore that declaration. At the sentencing hearing, it questioned defense counsel because it was apparently concerned about the credibility of that document. Sanchez told the probation department that Antoci should "spend the rest of his life behind bars in prison." But in the declaration submitted to the court, he said Antoci should not be sent to prison. The prosecutor said Sanchez's position on sentencing changed after he received a financial payment from Antoci for restitution which had been arranged by his defense counsel. The prosecutor added that Sanchez repeatedly told the prosecution that he wanted a maximum sentence for Antoci. The court asked Antoci's lawyer whether Sanchez's change in position was "a quid pro quo for the restitution." This question was appropriate, but Sanchez was not present to answer it. The trial court must consider the victim's views. But it is not bound by them where it finds them to be questionable. (*People v. Mockel* (1990) 226 Cal.App.3d 581, 587.)

Antoci notes that during the hearing the trial court made the remark, "We don't care legally what the victim says. He was a witness. He is not a party to this action." He claims this shows that the court was unaware of its obligation to consider a victim's statements under section 1191.1. But that is not the case. Antoci has taken the court's remarks out of context. Immediately before making these statements, the court explained that a prison term was appropriate because of the physical injuries inflicted on Sanchez. As the Attorney General notes, the court was essentially making the point that the victim's current position on sentencing, if credible, was not determinative given the severity of the injuries. Because the court asked several questions about Sanchez's change of position on sentencing, it certainly did not ignore his statements.

Failure to Properly Consider Antoci's Drug and Alcohol Use

Antoci claims the trial court erred by 1) not considering his drug and alcohol problem to be a mitigating sentencing factor, and 2) improperly using it as an aggravating factor. We disagree.

Antoci contends that in stating its reasons for rejecting probation, the trial court made no findings on his drug and alcohol use as a mitigating sentencing factor. The Attorney General responds that Antoci has waived this issue by not raising an objection in the trial court. The Attorney General is correct. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) After the court stated its reasons for the sentence, Antoci's counsel raised several issues, but he did not request a finding on drug and alcohol use as a mitigating sentencing factor. That omission constitutes a waiver of this issue on appeal. (*Ibid.*)

Even on the merits, the result is the same. Antoci claims the trial court failed to consider all the relevant mitigation factors and sentencing exhibits relating to his drug and alcohol use. But "unless the record affirmatively shows otherwise, a trial court is deemed to have considered all relevant criteria in deciding whether to grant or deny probation or in making any other discretionary sentencing choice." (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1318.) Here the trial court stated, "I've read and considered the probation report and all other submitted reports."

Antoci suggests that the trial court should have been aware that he had a health problem because the probation report indicates that one of the victims said Antoci may have "a drug addiction." He claims that based on the probation report, the court should have considered his physical addiction as a health problem for mitigation. But the probation department concluded that there was "no indication or claim of significant physical/mental/emotional health problem."

Moreover, "[d]rug use or drug addiction at the time of an offense is an example of a disputable factor in mitigation." (*In re Handa* (1985) 166 Cal.App.3d 966, 973.) "Where an alleged factor in mitigation is disputable, the court may find an absence of mitigating factors and need not explain the reason for its conclusion." (*Ibid.*) Here the

evidence at trial was conflicting on whether Antoci had used drugs. Defense witness Chelsea Wessels testified that she never saw him using drugs.

Antoci claims the trial court improperly used his drug use as an aggravating sentencing factor. But he has failed to cite to the record to support this claim. The court did not find that drug use was an aggravating factor. Because of the conflict at trial on the issue of drug use, the court said, "I don't know what was going on in his mind . . . if he was drug induced or what, that never really came out because there was a denial that he was on drugs." The court identified two aggravating sentencing factors--prior criminal history and the injuries to Sanchez. Drug use was not one of the aggravating sentencing factors. Antoci has not shown error.

Defense Witness Perjury as an Aggravating Sentencing Factor?

Antoci contends the trial court found that defense witnesses had committed perjury and it improperly used that finding as an aggravating sentencing factor. We disagree.

Trial courts must "exercise restraint in using perjury as an aggravating [sentencing] factor." (*People v. Howard* (1993) 17 Cal.App.4th 999, 1005.) Often the issue before the jury will be whether to accept the defendant's testimony or the victim's. (*Ibid.*) "The routine use of perjury as an aggravating sentencing factor in such cases would violate due process by chilling the defendant's constitutional right to testify." (*Ibid.*)

Here Antoci did not testify. The trial court felt that two of the defense witnesses Antoci called to support his position at trial were not credible. During the sentencing hearing, as an introductory remark, the court said, "I have some major concerns about those ladies that testified. I mean, it was shockingly perjured testimony without question in my humble opinion, 34 years listening to this stuff. And, you know, the whole thing smelled as far as I was concerned regarding them."

But these were only gratuitous remarks about trial testimony, not sentencing factors. The trial court later unequivocally said that Antoci was not being punished for the defense he asserted at trial. It said, "Finally, one comment on this issue

of going to trial . . . you're not punished for going to trial in this court" The court added, "We can't have people swinging metal rods at other people. That's unsocial conduct that you get punished for." Antoci has not shown that the court used defense witness perjury as a sentencing factor.

The Intent to Kill Remark

Antoci notes that during the sentencing hearing the trial court said, "When you swing something like . . . [the metal pipe] at somebody's head you're trying to kill them." It said Antoci "should be thankful [he is] not here on a murder charge." "So the [p]eople in the audience and the defendant as they sit here clearly are not happy. Clearly it's a sad situation from their point of view, but they have to understand it could have been a lot worse but for the luck of the victim" being hit in the arm, and not in the head. The court noted that the force of the blow to Sanchez "shattered" his arm. "So think what that would have done, especially if somebody has an eggshell skull as we call it"

Antoci claims the trial court by making these remarks abused its discretion because it "believed that this case should have been an attempted murder case" He suggests the court was making findings on issues that were not before it and could only be resolved by a jury.

The Attorney General responds that Antoci waived this issue by failing to raise it at the sentencing hearing. He claims that had Antoci "objected, the court could have clarified its comments or stated explicitly on the record that it was not considering appellant's intent to kill in imposing sentence." The Attorney General is correct. Any ambiguity about these remarks could have easily been clarified at the trial court level had Antoci raised a proper objection. (*People v. Scott, supra*, 9 Cal.4th at pp. 353, 355, 357.)

Even on the merits, Antoci has not shown reversible error. "A trial court's judgment is presumed to be correct and to be based on legitimate sentencing objectives. Isolated or ambiguous remarks by the trial court do not overcome that presumption. The party attacking the judgment must clearly and affirmatively demonstrate that the trial court relied on improper considerations." (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 835.) Consequently, a showing that the court mentioned irrelevant

matters at the sentencing hearing does not constitute reversible error unless the defendant shows that the court relied on them to impose the sentence. (*Ibid.*)

Antoci has not met his burden on this issue. He has not shown that the trial court relied on the above-mentioned remarks to impose the sentence. It was not necessary for the court to speculate about what could have happened to Sanchez if the metal rod hit his head. The statements about intent to kill were not particularly relevant, except to the extent that the court was trying to explain that Antoci's offense was more severe than the typical assault case. The court essentially made these remarks to emphasize the amount of violence Antoci used and to point out that this was not an appropriate case for probation. Those were the relevant considerations. Even so, the statement about intent to kill is consistent with the evidence the prosecution presented at trial. Sanchez testified that Antoci was "trying to kill us."

Antoci suggests that the trial court in sentencing relied on the belief that Antoci's assault offense should be considered as the equivalent of attempted murder. But if that were the case, the court would have imposed the maximum sentence for assault with a deadly weapon. Instead, it only imposed the low term of two years.

The Great Bodily Injury Enhancement

Antoci claims a remand for resentencing is required because the trial court was not aware of its authority to strike the great bodily injury enhancement. We disagree.

A trial court has discretion to strike a great bodily injury enhancement in the interests of justice. (§ 1385; *People v. Meloney* (2003) 30 Cal.4th 1145, 1155-1156.) Unless the record shows otherwise, we presume that the court was aware of the limits of its sentencing discretion. (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517 [there is a presumption that in sentencing the court was aware of the applicable law and followed it].)

Antoci claims that a comment by the trial court at the sentencing hearing shows that the court did not know that it could strike the enhancement. He notes that in

response to a question by defense counsel the court said, "Legally what I said is I can't do it. We don't stay a G.B.I. allegation."

The Attorney General responds that 1) this reference is not relevant to this issue because the trial court was discussing *staying* the enhancement, not *striking* it, and 2) Antoci has failed to cite the language in the record that demonstrates that the court knew it had the authority to *strike* the enhancement. The Attorney General is correct.

Antoci has taken an isolated comment out of context and selectively used it to make this argument. He has failed to note that after the trial court said, "We don't stay a G.B.I. allegation," it went on to state, "*We either strike it. . . . [¶] I would either strike it if I felt the evidence wasn't sufficient*" (Italics added.) The court went on to state that the aggregate five-year sentence was imposed because it was the sentence the court felt was "justifiable." Antoci has not shown that the court was unaware of its sentencing discretion.

We have reviewed Antoci's remaining contentions and conclude that he has not shown error.

The judgment is affirmed.

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GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

John S. Fisher, Judge
Superior Court County of Los Angeles

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